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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CALIFORNIA DENTAL ASSOCIATION,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE AMERICAN DENTAL ASSOCIATION, AMERICAN MEDICAL ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND NATIONAL ASSOCIATION OF REALTORS® AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*[1]

The American Dental Association ("ADA") is the oldest and largest national association of dentists in the United States. It is dedicated to furthering the education and training of dentists so that they may fulfill their "overriding obligation . . . to provide quality care in a competent and timely manner." See ADA, PRINCIPLES OF ETHICS AND CODE OF PROF'L CONDUCT 1 (1995). Through the ADA, members of the profession also carry out the "privilege and obligation of self-government," id., including the promulgation of ethical guidelines. These guidelines address, *inter alia*, ethical issues in advertising by dentists.

The American Medical Association ("AMA"), the largest association of physicians in the United States, was founded in 1846 to advance medical science and education and to upgrade the health of the American people. It sponsors a vast array of educational, scientific, and public health programs. The AMA has adopted a document, known as THE PRINCIPLES OF MEDICAL ETHICS, that consists of basic rules for the ethical practice of medicine. Its Council on Ethical and Judicial Affairs promulgates statements that apply the Principles to numerous issues confronting physicians, e.g., responsibilities to patients at the end of life. These statements include guidelines on ethical promotional practices by physicians.

The American Psychiatric Association ("APA") is the nation's leading organization of physicians specializing in psychiatry. It engages in a wide variety of educational, scientific, and public health activities. The APA promulgates and applies ethical

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief, and the consent letters have been filed with the Clerk of the Court.

standards for its members based on AMA standards. PRINCIPLES OF MEDICAL ETHICS: WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY.

The National Society of Professional Engineers ("NSPE") is an individual professional membership association of over 60,000 licensed engineers practicing in government, industry, education, construction and private practice. Its mission is to promote the ethical, competent and licensed practice of engineering. Through its many programs, NSPE helps establish educational and licensure standards for the protection of the public health and safety. Its CODE OF ETHICS FOR ENGINEERS encourages all engineers to practice consistently with those standards.

The National Association of Social Workers ("NASW") is a professional membership organization comprised of more than 155,000 social workers. The NASW seeks to encourage high standards of practice by social workers. In furtherance of this purpose, the NASW publishes STANDARDS FOR THE PRACTICE OF CLINICAL SOCIAL WORK and GUIDELINES FOR CLINICAL SOCIAL WORK SUPERVISION. It also disseminates the NASW CODE OF ETHICS to provide guidance to social workers on ethical issues that they may face.

The National Association of Realtors® ("NAR") is a non-profit association comprised of approximately 700,000 individuals involved in all aspects of the real estate profession, including brokerage, management, appraisal, and counseling. The NAR has issued a CODE OF ETHICS AND STANDARD OF PRACTICE to guide its members. The Code is intended to promote competence, fairness, and high integrity among Realtors®. Among the issues that it addresses are advertising and representations by NAR members to the public.

Amici are all nonprofit, professional associations. They are comprised of individuals who seek to apply a complex body of knowledge in meeting the needs of their patients or clients in an ethical manner. They have a long-standing tradition of responsible self-regulation in furtherance of the shared commitment of their members both to the patient or client and to the public. For these reasons, *amici*, like many other professional associations, promulgate codes of ethics and ethical guidelines.

This case involves a decision which subjects the California Dental Association ("CDA"), a voluntary, nonprofit association of dentists, to the jurisdiction of the Federal Trade Commission ("FTC") and which condemns ethical positions that were intended to help assure that advertising by members of the CDA is not "false, deceptive, or misleading." See *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 383 (1977). The Court has granted certiorari to determine whether Congress has given the FTC authority to regulate the CDA and, if so, whether the ethical guidelines of the Association can be found to violate the antitrust laws without a thorough analysis of their competitive significance. *Amici* have a direct interest in both issues.[2]

First, a decision that Congress has conferred upon the FTC jurisdiction over the CDA would subject *amici* and other professional associations to lengthy and expensive litigation brought by an agency which was not intended to have, and (as this case demonstrates) does not have, the broad perspective and expertise necessary to harmonize the public interest in legitimate professional self-regulation with the requirements of the antitrust laws. Every time that a professional association is

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[2] The Court previously granted certiorari to resolve the conflict on the first issue, but divided equally. *See American Med. Ass'n* v. *FTC*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided court*, 455 U.S. 676 (1982). Thus, the question remains unresolved.

subjected to an FTC investigation, its limited resources are diverted from the nonprofit activities for which they were intended. Significantly, moreover, there is absolutely no need to expose professional associations to these costs. Such associations are unquestionably subject to antitrust actions in federal court brought under the Sherman Act by the Department of Justice, State Attorneys General, and private parties.

Second, a decision upholding the invalidation of the ethical positions of the CDA on advertising by members, on the basis of the quick look given by the court below or the faulty analysis applied by the FTC, would expose the ethical guidelines of *amici* to antitrust condemnation whenever a government agency or private plaintiff saw fit to challenge them. In so doing, it would undermine the public interest in avoiding the evils, e.g., deception of consumers, that responsible professional self-regulation is intended to avert. Nearly a quarter of a century ago, in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 788-89 n. 17 (1975), this Court observed that the "public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." The antitrust consequences of the ethical guidelines of the CDA should be evaluated in a manner that takes into account "the public service aspect," and "other features of the professions." Unless they are, the antitrust laws, which are supposed to be a prescription for consumer welfare, see *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979), will, paradoxically, have produced the exact opposite result.

Amici offer this Brief in hopes that their insights into the legal issues raised by, and the practical consequences of, the decisions below may assist this Court.

STATEMENT OF THE CASE

1. The guidelines of the CDA at issue in this case prohibit "false or misleading" statements in advertising by dentists. More specifically, section 10 of the CDA's Code of Ethics provides:

> Although any dentist may advertise, no dentist shall advertise or solicit patients in any form of communication in a manner that is false or misleading in any material respect. In order to properly serve the public, dentists should represent themselves in a manner that contributes to the esteem of the public. Dentists should not misrepresent their training or competence in any way that would be false or misleading in any material respect.

See Appendix to Petition for Certiorari 190a ("Pet. App.") The CDA has issued Advisory Opinions which provide greater detail about the ethical standards applicable to dental advertising. For example, its Advisory Opinions denominate as inherently misleading the use of certain words to describe the cost of dental services, including "as low as," "and up," and "lowest prices." See *id.* at 202a-04a. According to the CDA, price advertisements that refer to the cost of dental services and use words of comparison, such as "low fees," should be based on verifiable data substantiating the comparison. *Id.* at 200a. In addition, the CDA has issued advice that discourages quality claims because such claims "are not susceptible to measurement or verification." *Id.* at 202a-04a, 216a-18a. Finally, the CDA has issued Advertising Guidelines that permit advertising of "discounts on regular fees," but that require certain clarifying disclosures in the advertisements. These include the dollar amount of the nondiscounted fee, the dollar amount or

percentage of the discount, and the length of time that the discount will be offered. *Id.*

Significantly, the maximum sanction that can be imposed by the CDA for violation of its ethical statements is exclusion from membership. Although a majority of dentists in California belong to the CDA, a significant minority does not. Membership in the CDA is not necessary to practice dentistry in California, and there is no evidence in the record that dentists who choose not to join the Association are at a significant competitive disadvantage. *Id.* 144a.

2. The FTC's complaint alleged that the CDA's ethical guidelines unreasonably restrain competition in violation of section 1 of the Sherman Act and section 5 of the FTC Act. The CDA defended on two grounds: First, it argued that the FTC lacks jurisdiction because the CDA is a nonprofit, professional association which is not "organized to carry on business for its own profit or that of its members" within the meaning of section 4 of the FTC Act. 15 U.S.C. § 44. Second, the CDA asserted that its ethical pronouncements constitute legitimate, self-regulatory activity that serves the public interest and that does not suppress competition.

The Administrative Law Judge ("ALJ") disagreed. He first held that the FTC had jurisdiction because a number of the CDA's activities provide a pecuniary benefit to members. Pet. App. 253a. Despite finding that the ethical guidelines of the CDA have "no impact on competition in any market in the State of California," *id.* at 246a, he determined that these guidelines constitute an unreasonable restraint of trade because they are inherently suspect and lack a plausible procompetitive justification.

The FTC affirmed the ALJ's decision -- but on grounds somewhat different than those relied on by the ALJ. The

Commission held that the CDA's restrictions on price advertising are unlawful per se, that the nonprice advertising guidelines could be declared unlawful under the abbreviated (or "quick-look") rule of reason analysis, and that, in any event, the CDA has market power sufficient to support a finding of anticompetitive effect. One member of the FTC concurred in the result reached in the majority opinion, but relied on the grounds stated by the ALJ. Commissioner Azcuenaga dissented, explaining that the CDA does not have market power and that the CDA has not engaged in anticompetitive conduct.

3. The Court of Appeals affirmed the decision of the FTC to condemn the ethical guidelines of the CDA. The Court held that an association that "provides tangible pecuniary benefits to members" is subject to FTC jurisdiction -- despite the Act's express restriction of FTC jurisdiction to associations "organized to carry on business for [their] own profit or that of [their] members." *California Dental Ass'n.* v. *FTC*, 128 F.3d 720, 725-26 (9th Cir. 1997). The Court also affirmed the FTC's decision that the CDA's ethical guidelines unreasonably restrain trade. It "disagree[d] with [the FTC's] use of per se analysis but sustain[ed] its alternative conclusion that an abbreviated rule of reason analysis applies." *Id.* at 726-27. The Court concluded that the restrictions that the CDA places on price and non-price advertising are sufficiently "naked" to justify application of the quick-look rule of reason. It held that the CDA has sufficient market power to harm competition through issuance of guidelines and that the guidelines at issue restrict competition. *Id.* at 728.

Judge Real dissented from both holdings. He explained that the FTC does not have jurisdiction because the CDA "does not operate commercially." *Id.* at 730. Assuming arguendo that the FTC has jurisdiction, Judge Real would have ruled that the quick-look analysis cannot be applied in this case: "[T]he rules of the CDA . . . are not per se a restraint on competition in the

dental profession nor are they sufficiently anti-competitive on their face to eschew a full-blown rule of reason inquiry." *Id.* at 731. In his view, all that the CDA was doing was "attempting to guard against misleading or unreliable advertising by its members." *Id.*

SUMMARY OF ARGUMENT

1. In stark contrast to the sweeping language of the contemporaneously enacted Clayton Act, the FTC Act expressly limits FTC jurisdiction to corporations "organized to carry on business for [their] own profit or that of [their] members." 15 U.S.C. § 44. Nothing in the language or legislative history of the FTC Act indicates that Congress intended to give the Commission jurisdiction over nonprofit, professional societies. On the contrary, Congress envisioned the FTC as a specialized agency that would develop expertise in the application of antitrust and other trade regulation law to industrial and commercial businesses operating in the for-profit sector of the economy. It vested antitrust authority over nonprofit associations of professionals exclusively in the federal courts enforcing the Sherman Act. Part I.A.

The CDA is not "organized to carry on business for its own profit or that of its members" within the meaning of § 4 of the FTC Act. 15 U.S.C. § 44. It is organized as a nonprofit corporation under state law. It is recognized by the Internal Revenue Service as a corporation "not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual" under section 501(c)(6) of the Internal Revenue Code, 26 U.S.C. § 501(c)(6). It is not intended to produce financial gain to be distributed to members in the form of dividends or any other manner. That the CDA "provides tangible, pecuniary benefits to its members," 128 F.3d at 726, is entirely irrelevant to the proper statutory inquiry. Rather, as the Eighth Circuit correctly recognized in *Community*

Blood Bank of Kansas City Area, Inc. v. *FTC*, 405 F.2d 1011, 1019-20 (8th Cir. 1969), an association is not organized to carry on business for the profit of its members because its activities confer some economic benefit upon them. Part I.B.

To be sure, this Court has upheld FTC orders against organizations of professionals. See, e.g., *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986). In those cases, however, the jurisdictional issue was never raised or decided. Moreover, comparison of the purposes of the CDA with those of the organizations involved in previous decisions of this Court underscores why the FTC lacks jurisdiction over the CDA. Part I.C.

2. Abbreviated rule of reason analysis may not properly be applied to canons of professional ethics which have, at a minimum, plausible procompetitive purposes and effects. The "quick-look" approach is confined to the exceptional circumstance in "'which no elaborate industry analysis is required to demonstrate the anticompetitive character'" of an inherently suspect restraint of trade. See *NCAA* v. *Board of Regents*, 468 U.S. 85, 109 (1984) (citation omitted). Here, by contrast, the fact that the ethical positions of the CDA arise in the professions and serve to assure the provision of non-deceptive information to potential patients requires a thorough scrutiny of the competitive significance of these positions. Part II.A.

Proper application of the rule of reason demonstrates that ethical positions which encourage disclosures to prevent deception in price advertising by dentists and which characterize certain non-verifiable claims of quality as deceptive promote competition and therefore satisfy antitrust requirements. Indeed, this Court has noted, albeit in the First Amendment context, that ethical rules governing professional advertising that require additional disclosures (instead of prohibiting

speech) and that ban unverifiable claims serve procompetitive purposes. See *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *Bates*, 433 U.S. at 383-84. Finally, ethical rules that prevent inaccurate advertisements are procompetitive because they make professional services more attractive to a public increasingly cynical about professional claims and conduct. Cf. *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 623 (1995). Part II.B.

The FTC's wrongful assertion of authority over the CDA resulted in its misguided condemnation of the ethical positions at issue. The decisions below chill numerous legitimate self-regulatory activities by nonprofit professional associations that serve the public interest. For all these reasons, the Court should reverse the decision below. Part II.C.

ARGUMENT

I. THE FTC LACKS JURISDICTION OVER NONPROFIT, PROFESSIONAL ASSOCIATIONS.

A. The starting point in determining the scope of the FTC's jurisdiction is the language of the FTC Act. See *Reiter*, 442 U.S. at 337. Unlike the Sherman Act, the FTC Act does not apply to all entities. Rather, section 5(a)(2) of the Act, 15 U.S.C. § 45(a)(2), explicitly limits the FTC's jurisdiction to "persons, partnerships, [and] corporations." Section 4 of the Act, 15 U.S.C. § 44, in turn, carefully defines the "corporations" that are subject to the Act. Specifically, an association is a "corporation" subject to FTC jurisdiction only

if it is "organized to carry on business for its own profit or that of its members."[3]

The language of sections 4 and 5 of the FTC Act reflects Congress' intention to make the FTC an agency of limited jurisdiction. In particular, the agency's jurisdiction is limited to for-profit, commercial entities and to associations that are organized to produce profit for such entities. The congressional intention on this point is best evinced by contrasting the FTC Act's jurisdictional provisions with those in the contemporaneously enacted Clayton Act.

Specifically, the same Congress that limited the FTC's jurisdiction to corporations "organized to carry on business for . . . profit" expressly made the Clayton Act (like the Sherman Act before it) applicable to *all* associations.[4] See *United States* v. *American Bldg. Maintenance Indus.*, 422 U.S. 271, 277 (1975) (Clayton and FTC Acts to be construed together). This juxtaposition is most telling. By limiting FTC jurisdiction to corporations organized for profit while making all associations subject to the Sherman and Clayton Acts, Congress manifested

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[3] Section 4, enacted in 1914, provides:

> "Corporation" means any company or association incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or capital stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members. 38 Stat. 717, 719.

[4] The Clayton Act (15 U.S.C. §§ 12-27), like the Sherman Act (15 U.S.C.§§ 1-7), applies to all "persons." Both statutes define "persons" to "include" all "associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." *See* 15 U.S.C. §§ 7, 12.

its intent to exclude nonprofit, professional associations from FTC jurisdiction while giving the federal courts that enforce the Sherman Act exclusive antitrust jurisdiction over such associations.

The legislative history of the FTC Act reinforces the conclusions that flow from its language and from a comparison of that language to the Clayton Act. The entire thrust of the Act's history is that the Commission was created to develop expertise concerning industrial, commercial, and other trade entities and thus be better able to apply national antitrust policy to such entities than would a court.[5] No representatives of professional or nonprofit associations were invited to testify about the FTC Act. Nothing in the Act's language or history in any way suggests a congressional concern with the activities of nonprofit, professional associations. Cf. *United States* v. *Oregon State Medical Soc'y*, 343 U.S. 326, 336 (1952) (market for medical and professional services presents issues "quite different than the usual considerations prevailing in ordinary commercial matters"). Indeed, when Congress created the FTC as an agency of limited jurisdiction over corporations "organized to carry on business for . . . profit," the professions and their associations were not even thought to be subject to the antitrust laws. See *Feminist Women's Health Ctr., Inc.* v. *Mohammad*, 586 F.2d 530, 552-553 (5th Cir. 1978) (Wisdom, J.) (professions not regarded in 1915 as subject to the antitrust laws). See also *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427, 436 (1932).

Significantly, in 1977, when the FTC sought legislation to expand its jurisdiction to include nonprofit associations

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[5] *See, e.g.*, H.R. Rep. No. 63-1142, at 11, 14, 18-19 (1914) (the FTC will be "an administrative body of practical men thoroughly informed in regard to business"); S. Rep. No. 63-597, at 8-9, 11, 28 (1914). *See also Community Blood Bank* 405 F.2d at 1017-18 (describing legislative history).

(including nonprofit professional associations),[6] Congress refused to accede:

> Clearly, the original FTC law was not intended to cover nonbusiness activities. . . . [T]he agency has more than enough to do in regulating business concerns without the need to extend its jurisdiction to regulate non-business groups -- groups which are completely different from business organizations in purpose, intent, and "ownership." . . . [D]uring hearings on the bill . . . . [o]rganizations, including the American Association of Medical Colleges, the American Dental Association, and the American Medical Association pointed out the detrimental and potentially debilitating effects upon the nonbusiness activities of not-for-profit organizations that FTC regulation could have. 123 *CONG. REC.* H33,622 (daily ed. Oct. 13, 1977) (remarks of Rep. Broyhill).[7]

This later legislative history "throw[s] a cross light" on the interest of Congress in 1914 that, together with the language

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[6] *See Proposed Federal Trade Commission Amendments of 1977 and Oversight: Hearings on H.R. 3816 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. 69 (1977) ("The bill would make several changes in the jurisdiction of the Commission. In particular, it would: (1) Broaden the reach of the FTC Act by redefining 'corporation' to include nonprofit corporations") (statement of Commission Chair Collier).

[7] *See also* H.R. Rep. No. 95-339, at 120 (1977) (minority report) ("At the present time, the jurisdiction of the Commission is limited to profit-making bodies. The effect of this provision would have been to extend the regulatory reach of the FTC to non-profit organizations. The full Committee deleted this provision and we fully concur in the Committee's decision in this regard. In reviewing the record, we note that the FTC made a very weak case for extending its jurisdiction in this fashion. On the other hand, the non-profit groups presented a very strong case in favor of deleting the new provision.")

and legislative history of the 1914 FTC Act, shows that the FTC lacks jurisdiction over nonprofit, professional associations. See *Pipefitters Local 562* v. *United States*, 407 U.S. 385, 411-12 (1972) (actions of later Congress, in combination with language and history of earlier enactment, illuminate the meaning of earlier enactment).

The Congressional decision to exclude nonprofit, professional associations from FTC jurisdiction leaves no gap in federal antitrust enforcement. The Sherman and Clayton Acts provide authority for antitrust proceedings against these entities in federal court by the Department of Justice. Moreover, the States extensively regulate the professions under both federal and state antitrust laws. Congress wisely excluded nonprofit, professional associations from the FTC's jurisdiction in order to spare such associations the burden of administrative proceedings before a tribunal, which (as this case demonstrates) has no special expertise in, or sensitivity to, their affairs.

B. The CDA epitomizes the kind of non-business entity that Congress chose to exclude from regulation by the FTC. It is an association of dentists -- not of industrial corporations or dealers. It is organized neither to conduct business within the meaning of the FTC Act nor to seek profit for itself. To the contrary, it is organized and operates as a nonprofit corporation under California law. Pet. App. 161a-62a. It is predominantly devoted to educational, scientific, and public health goals. Not surprisingly, therefore, it has been recognized by the Internal Revenue Service as a corporation "not organized for profit" under 26 U.S.C. § 501(c)(6). *Id.* at 174a.

Nor is the CDA organized to produce profit for its members. The traditional and generally accepted meaning of the word "profit" is gain over and above expenditures or investment. *Community Blood Bank*, 405 F.2d at 1018-19. An entity is not organized to carry on business for profit unless it is designed to

accumulate gain for distribution to shareholders or members. The CDA is not organized for these purposes. Indeed, in recognizing the CDA as exempt from payment of federal income tax pursuant to 26 U.S.C. § 501(c)(6), the IRS had to find that "no part of the net earnings" of the CDA "inures to the benefit of any private shareholder or individual."

Despite the language and legislative history of the FTC Act, the court of appeals held that the CDA is subject to FTC jurisdiction. Citing *AMA* v. *FTC*, 638 F.2d at 448, the court concluded that, although a nonprofit, professional association "may not directly distribute 'gain' to [its] members in the same sense as a for-profit corporation," it is nonetheless a "corporation[]" subject to FTC regulation if "the organization provides tangible, pecuniary benefits to its members." *California Dental Ass'n.*, 128 F.3d at 726. This ruling, like the decision in *AMA* on which it relied, does violence to the plain language of the Act. The Act speaks of corporations that are "organized to carry on business for . . . profit" - not professional associations that are "organized" as nonprofit corporations but that provide some "pecuniary benefits" for members. The lower court's omission of the words "organized to carry on business for" from its definition of corporation, and its substitution of "pecuniary benefits" for the statutory term "profit" distort the language and plain meaning of section 4.

The proper construction of section 4 of the FTC Act, 15 U.S.C. § 44, is illustrated in *Community Blood Bank*, 405 F.2d at 1022. There, the Eighth Circuit held that a nonprofit hospital association and a community blood bank were outside the FTC's authority. The hospital association closely resembled the CDA for purposes of this case. Like the CDA, the hospital association in *Community Blood Bank* was organized as a nonprofit corporation and performed numerous eleemosynary functions. In addition, however, the hospital association served certain business interests of its member hospitals -- assisting in

the training and procurement of personnel, providing coordinated planning and financing, and furnishing a forum for resolving questions by pathologists. See *Community Blood Bank of Kansas City Area, Inc.*, 70 F.T.C. 728, 863-64 (1966), *annulled by* 405 F.2d 1011 (1969). Indeed, the FTC explicitly found that the association "performed very valuable services" for its members. *Id.* at 864.

Nevertheless, the Eighth Circuit recognized that the test of jurisdiction under the FTC Act is whether an entity is "organized to" carry on "business for profit within the traditional meaning of that language." 405 F.2d at 1018 (emphasis omitted). Profit is gain from business or investment over and above expenses, not some incidental economic benefit conferred by an association's activities. Thus, the court held that whether the FTC has jurisdiction over a corporation depends on the "reality" of whether the corporation "in law and in fact" operates as a nonprofit organization. 405 F.2d at 1019. Under this test, the FTC was held to lack jurisdiction over the hospital association. Similarly, it should be held to lack jurisdiction over the CDA.[8]

C. To be sure, this Court has upheld FTC orders against associations. See, e.g., *FTC* v. *Superior Court Trial Lawyers Professional Ass'n*, 493 U.S. 411 (1990); *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986). Significantly, the question of

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[8] The FTC plainly has the power to determine that an association's claimed status as a nonprofit is a sham and that the association is in fact organized to engage in business for profit or to funnel profit to "members." *See, e.g., Ohio Christian College*, 80 F.T.C. 815, 833, 849 (1972) (determining that the FTC had jurisdiction over titular nonprofit after finding that the nonprofit was a "shell" designed to further the financial interests of an individual). But a genuine nonprofit association -- that is, an association not organized in order to pursue either its own profit or that of its members -- is not subject to the FTC's jurisdiction.

jurisdiction was not considered in those cases. Accordingly, the issue was not decided by this Court. See *Steel Co.* v. *Citizens for a Better Env't*, 118 S.Ct. 1003, 1011 (1998) ("drive-by jurisdictional rulings . . . have no precedential effect").

Moreover, these cases do not suggest, contrary to the language and legislative history of the Act, that Congress intended to subject traditional nonprofit, professional associations to FTC jurisdiction. In both *Superior Court Trial Lawyers Association* ("SCTLA") and *Indiana Federation of Dentists* ("IFD"), the respondents were organized for the express purpose of carrying on business to obtain a profit for their members. The Superior Court Trial Lawyers Association was a "loosely-organized unincorporated association [which] served as the rallying point for the 1983 campaign waged by [Civil Justice Act] lawyers to increase their fees." *Superior Court Trial Lawyers Ass'n*, 107 F.T.C. 513, 516 (1986). And the FTC found that "[t]he 'objectives' of [the Indiana Federation of Dentists], as set forth in Article I, Section 2 of its constitution and by-laws, [we]re essentially 'to represent the economic interests of Indiana dentists as a labor organization.'" *Indiana Fed'n of Dentists*, 101 F.T.C. 57, 74 (1983). Here, by contrast, the purpose of the CDA is "to promote high professional standards in the practice of dentistry," and "to encourage and promote the art and science of dentistry as a profession." Pet. App. 161a-62a. The contrast between the purposes of the CDA and those of the SCTLA and IFD simply serve to underscore the impropriety of the assertion of FTC jurisdiction in this case.

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Section 4 of the FTC Act should be given its plain meaning. The carefully circumscribed definition of "corporation" enacted by Congress will mean little if nonprofit associations which are organized to advance science, education, public health,

professional ethics, and *pro bono* activities become subject to FTC jurisdiction any time that they offer a credit card, favorable rental car rates, discounted insurance premiums, or other pecuniary benefits to members. Section 4 excludes associations not "organized to carry on business for . . . profit" from the FTC's jurisdiction. It leaves to the federal courts enforcing the Sherman Act the delicate task of accommodating the legitimate non-commercial purposes and activities of nonprofit associations with the goals of the antitrust laws. If the FTC believes that, as a result, "there exists a deficiency in the Act, the cure must come from Congress, not by judicial enlargement of the statute." *Heater* v. *FTC*, 503 F.2d 321, 327 (9th Cir. 1974). See *Reiter*, 442 U.S. at 345.

II. ETHICAL GUIDELINES THAT DISCOURAGE DECEPTIVE ADVERTISING BY DENTISTS SHOULD BE EVALUATED BY APPLYING A THOROUGH ANALYSIS OF THE COMPETITIVE SIGNIFICANCE OF SUCH GUIDELINES AND SHOULD BE FOUND TO SATISFY ANTITRUST REQUIREMENTS.

A. The "prevailing standard" for evaluating alleged restraints of trade is a traditional "rule of reason" analysis. See *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977). In that analysis, "[t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." *Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918) (Brandeis, J.). A defendant's motive is relevant -- "not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." *Id.*

In *NCAA*, this court stated that, in certain limited situations, "'no elaborate industry analysis is required to demonstrate the

anticompetitive character'" of an inherently suspect, "naked" restraint. 468 U.S. at 109 (quoting *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 692 (1978)). The Court repeated this principle in *Indiana Fed'n of Dentists*, 476 U.S. at 459.

The "quick-look" approach suggested by these decisions has no application here. The ethical guidelines of the CDA are not a naked restraint of trade. To the contrary, they require additional disclosures to reduce the potential for deception in price advertising by dentists, and they characterize certain quality claims in dental advertising as inherently deceptive. They do not on their face adversely affect price or output. And, as explained below, the guidelines serve substantial procompetitive ends. Finally, they were issued by an association to which no dentist need belong in order to compete effectively and to which many dentists choose not to belong. Pet. App. 144a, 161a-62a, 245a. There is nothing inherently suspect about facially justifiable rules against misleading advertising.[9] If quick-look analysis may be used to strike down the ethical guidelines here, it is properly applicable in any case, and the quick-look approach will have swallowed the traditional rule of reason.

Indeed, the ethical pronouncements of the CDA are singularly inappropriate for application of a truncated rule of reason. This Court has repeatedly observed that "by their nature,

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[9] The ethical rules at issue here bear no resemblance to the restraints of trade addressed in *Professional Eng'rs*, 435 U.S. at 684-85 (an ethical rule banning all competitive bidding by professional engineers), and *Indiana Fed'n of Dentists*, 476 U.S. at 462-63 (a concerted refusal by dentists to provide insurance companies with dental x-rays to determine whether to reimburse a patient for a particular treatment). Unlike the rules at issue in those cases, the ethical canons of the CDA are supported by strong procompetitive justifications.

professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary." *National Soc'y of Prof'l Eng'rs*, 435 U.S. at 696. In *Goldfarb*, the Court explained that:

> [t]he fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.

421 U.S. at 788-89 n.17.

Given that the ethical guidelines at issue are not inherently suspect, the fact that they "operate[ ] upon a profession" suggests that they should not be cavalierly dismissed after only a quick-look. It is incorrect both to assume that such guidelines are anticompetitive and to place the burden of proof on the respondent association to show that they are not.[10]

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[10] Other courts of appeals have faithfully followed this Court's teaching that quick-look analysis is inappropriate unless a restraint is inherently suspect and unsupported by any procompetitive justification. *See, e.g., United States* v. *Brown University*, 5 F.3d 658, 678 (3d Cir. 1993) (reversing a district court decision that had applied an abbreviated rule of reason analysis to a college association's agreement to award financial aid only to needy students and to set the amount of family contributions paid by commonly admitted students); *Vogel* v. *American Soc'y of Appraisers*, 744 F.2d 598, 603 (7th Cir. 1984) (Posner, J.) (refusing to apply quick-look rule of reason analysis to an ethical rule unless "it has clear anticompetitive consequences and lacks any redeeming

(continued...)

B. Proper application of the rule of reason demonstrates that the ethical guidelines of the CDA are, on balance, procompetitive and therefore accord with antitrust requirements. First, an understanding of the reason for the guidelines suggests their procompetitive purposes. Specifically, the guidelines were issued in order to discourage the misleading of consumers in dentistry -- a field in which deception by the unscrupulous is easy and carries with it particularly unfortunate consequences. As this Court recognized more than sixty years ago:

> The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief.

Semler v. *Oregon State Bd. of Dental Exam'rs*, 294 U.S. 608, 612 (1935). The ethical canons of the CDA are simply the exercise by that Association of its "special role" in resolving "the problems in defining the boundary between deceptive and nondeceptive advertising" and in assuring that advertising by professionals "flows both freely and cleanly." See *Bates*, 433 U.S. at 384. See also *Professional Eng'rs*, 435 U.S. at 696 ("the problem of professional deception is a proper subject for an ethical canon").

Second, the effect of the CDA guidelines is to promote competition both among dentists generally and between those who choose to join the CDA and those who do not. The CDA

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[10] (...continued)
competitive virtues").

guidelines exhort dentists who advertise discounts to include information necessary to enhance consumer comprehension of the discount. They oppose claims of low prices that do not answer the question "Low compared to what?" The nonprice provisions urge dentists who subscribe to the CDA's canons to avoid claims of quality or comfort that are not verifiable.

Discouraging deceptive advertising promotes competition by helping to ensure that consumers receive accurate information about services. See *Bates*, 433 U.S. at 364 ("commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system") (citing *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 603-04 (1967) (Harlan, J., concurring)). Thus, this Court has repeatedly recognized the procompetitive nature of the sort of professional self-regulation at issue here, albeit in the context of First Amendment challenges to professional ethics rules.

With respect to disclosures necessary to make price advertising by professionals non-deceptive, this Court in *Zauderer* upheld state law requirements that attorneys who advertise their willingness to represent clients on a contingent-fee basis must also state the contingent-fee rate and that the client may have to bear certain expenses even if he or she loses. 471 U.S. at 650-53 & n.15. In so doing, the Court relied on the "material differences between disclosure requirements and outright prohibitions on speech." *Id.* at 650. Critically for purposes of this case, the Court reasoned that disclosure requirements generally provide information of value to consumers -- *i.e.*, are procompetitive -- and should be upheld "as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651 (footnote omitted). See also *Bates*, 433 U.S. at 375 (a profession "retains the power to correct omissions that have the

effect of presenting an inaccurate picture[;]" "the preferred remedy is more disclosure").

With respect to unverifiable quality claims, this Court in *Bates* stated that "claims as to the quality of services" may be deceptive where they are "not susceptible of measurement or verification" and are therefore "so likely to be misleading as to warrant restriction." 433 U.S. at 383-84. See also *Zauderer*, 471 U.S. at 640 n.9. Ethical rules forbidding misleading and deceptive advertising protect the flow of accurate information to consumers and thus promote competition. See, e.g., *In re R.M.J.*, 455 U.S. 191, 203 (1982).

The ethical guidelines of the CDA promote competition in yet another way. They seek to enhance the reputation of members of the CDA for honesty in dealing with patients and thereby to increase the desire of patients to utilize the services of these dentists -- as opposed to dentists who do not adhere to CDA canons. Self-regulation of this sort promotes competition by making services of CDA members more attractive. Cf. *Florida Bar*, 515 U.S. at 625, 635 (upholding prohibitions on attorney solicitation justified as necessary to "protect the flagging reputations of Florida lawyers" and to "prevent[] the erosion of confidence in the profession"). See also *NCAA*, 468 U.S. at 114 (recognizing that a practice which enhances the public's desire for a product or service may be procompetitive).

Finally, it is significant for antitrust purposes that non-members are not bound to follow the guidelines of the CDA and that many dentists choose not to join that organization -- without suffering any adverse competitive effect. Pet. App. 245a-46a. These facts do not, by themselves, immunize the CDA's ethical guidelines from antitrust scrutiny. As Commissioner Azcuenaga recognized in her dissent at the FTC, however, they do require solid and convincing proof that the guidelines actually have had an adverse effect on competition in

a properly defined market. Such proof is utterly lacking in the record of this case.

C. As this case demonstrates, improper application of the rule of reason to ethical guidelines of the professions exposes to unwarranted antitrust condemnation self-regulatory activities that serve the public interest. In addition, concern about misapplication of the rule of reason may cause associations which cannot bear the financial consequences of protracted antitrust proceedings to issue ethical statements that are so general that they do not provide as much guidance as they could and should. Such statements may provide protection from FTC scrutiny, but they offer practitioners no useful elaboration on the sorts of representations that could be misleading or on the sorts of disclosures that might minimize deception.

Many professional associations, including the American Bar Association ("ABA"), the AMA, and the ADA, have promulgated ethical guidelines designed to prevent deceptive advertising and to encourage behavior that will advance the interests of those served by its members. For example, Part 7 of the ABA's Model Rules of Professional Conduct addresses lawyer advertising. Center for Prof'l Responsibility, ABA, ANNOTATED MODEL RULES OF PROF'L CONDUCT, 3d. ed. 483 (1996). Rule 7.1 forbids lawyers to make any "false or misleading communication"; subsection 7.1(b) defines as false and misleading any statement "likely to create an unjustified expectation about results the lawyer can achieve;" and subsection 7.1(c) similarly defines any statement comparing a lawyer's services with those of any other lawyer "unless the comparison can be factually substantiated." *Id.* These prohibitions bear a close resemblance to the CDA ethical statements at issue. See also Opinion 5.02, AMA, CODE OF MED. ETHICS (1994) (interpreting the prohibition of false and misleading statements to encompass incomplete pricing disclosures and subjective claims about the quality of medical

services); Section 5-A, ADA, PRINCIPLES OF ETHICS AND CODE OF PROF'L CONDUCT 8 (1995) (to same effect); NASW CODE OF ETHICS § 4.06(c) (calling for accuracy in representations "of professional qualifications, credentials, education, competence, affiliations, services provided [and] results to be achieved"); STANDARD OF PRACTICE 12-1, NAR CODE OF ETHICS AND STANDARDS OF PRACTICE (authorizing use of the term "free" and similar terms in advertising by Realtors® "provided that all terms governing availability of the offered product or service are clearly disclosed at the same time").

These ethical positions serve to promote the dissemination of accurate information to patients and clients, to prevent the often tragic injuries that occur when people fall victim to unscrupulous or incompetent practitioners, and to breed public trust and confidence in persons who subscribe to them. They are intended to carry out the historic role of the professions to regulate themselves in the public interest. As such, they are precisely the sort of statements that should receive full consideration of their purposes, their context, and their competitive effects -- that is, that should be judged under full rule of reason analysis. Such analysis will generally demonstrate, as it demonstrates in this case, that the ethical statements of professional associations satisfy antitrust requirements. Yet, all of these legitimate self-regulatory efforts are called into question by the erroneous analyses applied in the decisions below.

* * * *

In two respects, the FTC overreached in this case: First, the FTC exceeded the proper scope of its authority by challenging the ethical rules of a nonprofit, professional association. Second, it clearly demonstrated why Congress decided not to burden nonprofit, professional associations with antitrust scrutiny by an agency insensitive to the realities of such

associations. It condemned a responsible effort at self-regulation without a thorough economic analysis of the regulation's effect on competition. On both grounds, this Court should reverse the judgment of the Court of Appeals.

CONCLUSION

For all of these reasons, the decision of the Court of Appeals should be reversed.

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